RECORD AND BRIEFS

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No. 16-1276

In the Supreme Court of the United States

DIGITAL REALTY TRUST, INC.,
Petitioner,

v.

PAUL SOMERS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL WHISTLEBLOWER CENTER, ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

The National Whistleblower Center ("NWC") is a nonprofit, tax-exempt organization dedicated to the protection of employees who lawfully report illegal conduct.[1] *See* www.whistleblowers.org. Since 1984, the Center's directors have represented whistleblowers, taught law school courses on whistleblowing, and authored numerous books and articles on this subject. In 2016, the NWC was named a Grand Prize winner of USAID's Wildlife Crime Tech Challenge for its innovative solution to use whistleblowers to combat wildlife crime.[2]

The NWC has participated before this Court as *amicus curiae* in *English v. General Elec.*, 496 U.S. 72 (1990); *Haddle v. Garrison*, 525 U.S. 121 (1999); *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000); *Beck v. Prupis*, 529 U.S. 494 (2000); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Doe v. Chao*, 540 U.S. 614 (2004); *Lawson v. FMR LLC*, 134 S. Ct 1158 (2014); *Lane v. Franks*, 134 S. Ct. 2369 (2014); *Kellogg Brown & Root Services, Inc. v. U.S. ex rel. Carter*, 135

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. The parties have filed letters granting blanket consent to the filing of *amicus* briefs with the clerk.

[2] This international competition, was sponsored by the U.S. Agency for International Development, in partnership with the Smithsonian Institution and National Geographic. https://www.usaid.gov/news-information/press-releases/sep-1-2016-usaid-announces-grand-prize-winners-wildlife-crime-tech-challenge.

S. Ct. 1970 (2015); *Universal Health Svcs. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016); and *State Farm Fire & Cas. Co. v. U.S. ex rel. Rigsby*, 137 S. Ct. 436 (2016).

During the drafting of the Dodd-Frank Act ("DFA"), the NWC proposed adding Subdivision (iii) to the Act's anti-retaliation section. The NWC was the first organization to meet with the U.S. Securities and Exchange Commission concerning implementation of the whistleblower rules.[3] During the SEC's rulemaking proceedings, the NWC filed numerous written comments and met individually with each Commissioner to explain the importance of protecting internal whistleblowers. *See infra* note 10. In the final rulemaking, the Commission cited to the NWC's comments forty-five times. *See* Securities Whistleblower Incentives and Protection, 76 Fed. Reg. 34,300 (June 13, 2011).

Amici Donna Boehme was the first global compliance and ethics officer for two multinationals. As Group Compliance and Ethics Officer for BP plc (London), she established the company's first global compliance and ethics function in 2003, including the company's global code of conduct, covering 100,000+ employees in over 100 countries, a dedicated global compliance and ethics team and a groundbreaking network of 135+ senior-level business ethics leaders. At BOC Group (now part of Linde Group), she

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[3] *See Memorandum from the Office of the Chairman regarding meeting with National Whistleblowers Center*, U.S. SEC. & EXCH. COMM'N (Aug. 23, 2010), https://www.sec.gov/comments/df-title-ix/whistleblower/whistleblower.shtml.

established the company's first global compliance and ethics function and its first global code and program.

As Principal of Compliance Strategists LLC, Ms. Boehme advises a wide spectrum of private and public entities on compliance matters. She serves on the respective boards of RAND Center of Corporate Ethics and Governance, Rutgers Center for Government Compliance & Ethics. She is an Emeritus Member and past Board member of the Ethics and Compliance Officer Association, a past Board member of the Association of Corporate Counsel – Europe, and past Advisory Board member of The Society of Corporate Compliance & Ethics. She was a charter member of the Conference Board Council on Corporate Compliance & Ethics, the Compliance and Ethics Leadership Council of the Corporate Executive Board and a past member of the Ethics Resource Center (Fellows Program). *See Donna C. Boehme*, COMPLIANCE STRATEGISTS, http://compliancestrategists.com/pro/our-team/donna-c-boehme. Ms. Boehme submitted comments and met with SEC Commissioners during the rulemaking proceeding.

SUMMARY OF THE ARGUMENT

The question in this case is whether the Dodd-Frank Act ("DFA") whistleblower provisions protect internal reporting. For the reasons argued herein, this Court should affirm the holding of the U.S. Court of Appeals for the Ninth Circuit.

First, Congress explicitly authorized the U.S. Securities and Exchange Commission ("SEC" or "Commission") to conduct a rulemaking and determine the "manner" in which a "whistleblower" can provide information to the Commission. During the rulemaking proceedings, the regulated community strongly urged the Commission to incorporate internal disclosures into the core definition of a "whistleblower" covered under the DFA. In the final rules, the Commission exercised its discretion to incorporate internal disclosures into the definition of "whistleblower." To now hold that the DFA does not protect internal reporting would upend the plain language of the DFA and the process by which the Commission established the "manner" for making reports.

Second, Digital's argument that the rulemaking proceeding did not address the anti-retaliation provisions of the DFA is false and misleading. The Commission expressly requested – and received – comments pertaining to "the interpretation or implementation of the anti-retaliation provisions of Section 21(h)."

Third, basic rules of statutory construction require that 15 U.S.C. § 78u-6(h)(1)(A)(iii) ("Subdivision (iii)") protect internal reporting. Protecting internal reports harmonizes the DFA with the securities laws as a whole. Subdivision (iii)'s definition of protected disclosures was inserted into the statutory provisions well after the more general definition of "whistleblower" in the DFA at 15 U.S.C. § 78u-6(a)(6), and is thus controlling.

Fourth, Subdivision (iii) of 15 U.S.C. § 78u-6(h)(1)(A) not only protects internal disclosures, but also disclosures to the DOJ and Congress. If this Court strikes down protections for internal disclosures, it will also strike down protections for employees who report to Congress and the DOJ. To contend that Congress would write itself and the DOJ out of the definition of protected disclosures exemplifies the fallacy of Digital's argument.

Finally, the legislative history and administrative and judicial precedents under whistleblower laws analogous to the DFA demonstrate that Congress intended disclosures to compliance departments and managers to be fully protected. Interpreting the DFA as not covering internal disclosures "would nullify not only the protection against discharge but also the fundamental purpose of the Act," reducing the Act to "a hollow promise of protection." *Phillips v. Interior Bd. of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1971).

The judgment below should thus be affirmed.

ARGUMENT

I. THE SEC ESTABLISHED THAT THE "MANNER" IN WHICH A "WHISTLEBLOWER" CAN PROVIDE INFORMATION TO THE COMMISSION INCLUDES INTERNAL REPORTS.

Congress explicitly granted the U.S. Securities and Exchange Commission ("SEC" or "Commission") the authority to define the "manner" in which an individual could provide the SEC with information and qualify as a "whistleblower" under the DFA.[4] Thus, the entire predicate of Digital Realty Trust, Inc.'s ("Digital") petition, that the SEC "invent[ed] a different definition" of whistleblower, is unsupportable. The SEC was in fact required by Congress to define the "manner" in which information was provided to it.

For good reason,[5] the SEC decided that one such manner would be for a whistleblower to report

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[4] The DFA states that the "term 'whistleblower' means any idvidudal who provides . . . information relating to a violation . . . to the Commission, **in a manner establishshed, by rule or regulation, by the Commission.**" 15 U.S.C. § 78u-6(a)(6) (emphasis added).

[5] The real risks facing internal whistleblowers were documented in a 2015 comprehensive survey. THE POLITICS OF INTERNAL AUDITING, INSTITUTE OF INTERNAL AUDITORS RESEARCH FOUNDATION (2015). The Institute of Internal Auditors is a 180,000-member organization representing auditors. The study found that 49% of Chief Auditing Executives were told "not to perform audit work in high-risk areas," while another 55% were "directed to omit important findings" from their audit reports. *Id.* Many auditors reported retaliation for

potential securities law violations internally to their company, who in turn would be under numerous regulatory duties to investigate and self-report to the Commission any actual violations.[6] As stated by the Chair of the SEC at the time, "[p]erhaps most significantly, the final rules would give credit to a whistleblower whose company passes the information along to the Commission, even if the whistleblower does not." Mary L. Shapiro, SEC Chairman, Opening Statement at SEC Open Meeting: Item 2—Whistleblower Program (May 25, 2011), https://www.sec.gov/news/speech/2011/spch052511mls-item2.htm.

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refusing to alter their reports. The co-author of the report, Larry Rittenberg, Professor Emeritus at the Wisconsin School of Business, described the findings by stating "[i]t was shocking to see the extent to which practicing internal auditors have been subjected to political pressure . . . This wasn't simply a few horror stories from shaken internal auditors in bad job situations. We found pervasive efforts to undermine transparency and effective corporate governance." Peter Kerwin, *Internal Auditors Face Intense Political Pressures to Influence Findings*, UNIV. OF WISCONSIN (March 16, 2015), https://bus.wisc.edu/knowledge-expertise/newsroom/press-releases/2015/03/16/internal-auditors-face-intense-political-pressures-to-influence-findings.

[6] Digital is required to file, under oath, quarterly and annual reports to the SEC which must attest to the accuracy and competence of the company's internal controls and be certified by its Chief Executive Officer and Chief Financial Officer. *See, e.g.*, Digital Realty Trust, Inc., Quarterly Report (Form 10-Q) (Aug. 9, 2017). Digital must certify that, based their "internal control" procedures, they have identified "[a]ll significant deficiencies and material weaknesses" with these controls, and can attest to the fact that they have "disclosed" "[a]ny fraud, whether or not material, that involves management." *Id.* at Ex. 31.1.

Despite Digital's contention otherwise, whistleblowers who report internally are currently covered by the plain language of the whistleblower definition of the DFA. 15 U.S.C. § 78u-6(a)(6). The Commission's decision to include internal reporting as one of the "manners" in which an individual could qualify as a "whistleblower" is controlling on this Court.

A. The Regulated Community Urged the SEC to Incorporate Internal Disclosures into the Core Definition of the "Manner" Employees Could Qualify as a "Whistleblower."

During the SEC's rulemaking proceeding, one of the most debated issues concerned the Commission's authority under Section 78u-6(a)(6) to define the "manner" for which an individual must provide information to the Commission to qualify as a "whistleblower." *See Comments on Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934,* ("*Comments*") *File No. S7-33-10*, U.S. SEC. & EXCH. COMM'N (last modified Apr. 27, 2015), https://www.sec.gov/comments/s7-33-10/s73310.shtml.

During these proceedings, not one corporation or corporate trade association urged the Commission to narrowly define "whistleblower" as covering only persons who report violations to the Commission. Rather, the regulated community, en masse, strongly

urged the SEC to define the "manner" an employee could qualify as a "whistleblower" to include persons who reported violations internally. Numerous corporations even argued that internal reporting should be a **mandatory** requirement that employees would have to meet in order to become a qualified "whistleblower."

For example, the law firm of Covington & Burling, on behalf of a wide-range of companies, including Apache Corp., Cardinal Health, Goodyear Tire, Hewlett-Packard, Merck, Microsoft, Procter & Gamble, and United Technologies, recognized the "extraordinarily broad rulemaking authority" granted the Commission to establish the "manner" in which an individual could become a "whistleblower" and urged the SEC to interpret this section to support "effective internal reporting procedures." *Comments*, COVINGTON & BURLING LLP 2-3 (Feb. 18, 2011), https://www.sec.gov/comments/s7-33-10/s73310-283.pdf.

The Association of Corporate Counsel ("ACC"), a 26,000-member organization representing "attorneys employed in the legal departments of corporations and private-sector organizations worldwide," stated it "strongly support[s] protections for individuals who identify and report misconduct" internally. *Comments*, ASSOC. OF CORP. COUNSEL 1 n.1, 3 (Dec. 15, 2010), https://www.sec.gov/comments/s7-33-10/s73310-126.pdf. While recognizing "the valid concern that some employees will fear retaliation for blowing the whistle," the ACC stated its belief that "[t]he solution to that problem is not, however, a

scheme to undermine important and effective internal compliance and reporting systems; rather, employees who **fear retaliation may rely on the anti-retaliation provision contemporaneously enacted by Congress.**" *Id.* at 5 (emphasis added). Indeed, the ACC urged the SEC to adopt a definition of "whistleblower" as an employee who reports "internally first." *Id.* at 5 n.10.[7]

Dozens of other comments submitted by the regulated community strongly encouraged the SEC to incorporate internal whistleblowing into the definition of a "whistleblower." *See Comments*, U.S. SEC. & EXCH. COMM'N https://www.sec.gov/comments/s7-33-10/s73310.shtml.[8]

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[7] Consistent with the concerns raised by the ACC, the Commission was provided a "White Paper" presented at the RAND Center for Corporate Ethics and Governance Conference Proceedings on March 5, 2009, documenting the problems with creating effective corporate compliance programs post-SOX and explicitly calling upon "Congress and regulators" to "do more to support effective" compliance programs. Donna Boehme, *From Enron to Madoff: Why Many Corporate Compliance and Ethics Programs Are Positioned for Failure*, RAND CENTER FOR CORPORATE ETHICS AND GOVERNANCE 30 (March 5, 2009), https://www.rand.org/pubs/conf_proceedings/CF258.readonline.html. Among the major deficiencies identified within the existing compliance programs was a lack of independence for Chief Ethics and Compliance Officers and the need for "vigorous enforcement of non-retaliation policies." *Id.* at 31. The central issue raised in this White Paper and presented to key policy makers just prior to the enactment of the DFA was "how can companies put integrity back in business?" *Id.*

[8] *See, e.g., Comments*, INST. OF INTERNAL AUDITORS 1, 3 (Dec. 17, 2010) (urging the Commission to "take every effort to encourage, support, and strengthen effective processes within

Amici Chamber of Commerce was among the most aggressive commentators recognizing the "ample discretion" the Commission has to define the "manner" for which whistleblowers can "submit their allegations" to include internal reporting. *Comments*, CHAMBER OF COMMERCE 3, 3 n.6 (Dec. 17, 2010), https://www.sec.gov/comments/s7-33-10//s73310-194.pdf. It recognized that internal reporting could

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companies" to investigate fraud and to "protect and champion internal whistleblowers."); *Comments*, BUS. ROUNDTABLE INST. 3, 8 (Dec. 17, 2010) (asking the Commission to ensure that the manners established by the Commission for employees to report violations "encourage employees and other potential whistleblowers to first utilize the well-developed internal compliance elements of leading companies" and establish rules that would permit reporting procedures that "both afford whistleblower protection and allow for appropriate . . . internal investigation activities."); *Comments*, DELOITTE & TOUCHE LLP 8 (Dec. 17, 2010) (recognizing that the "SEC has broad authority to promulgate a final rule that requires timely internal reporting . . . The SEC may, for example, limit the definition of 'whistleblower' to one who first uses internal whistleblower procedures," and has the authority to predicate the amount of a reward on "prompt internal reporting"); *Comments*, ALCOA ET AL. 11, 15 (Dec. 17, 2010) (companies including Alcoa, Citigroup, Intel, Johnson & Johnson, Pfizer and Prudential, acknowledging the "longstanding Commission guidance" promoting internal reporting and asking the Commission to require whistleblowers to use internal procedures and "promote internal reporting in its final rules"); *Comments*, D.C. BAR SECTION ON CORP., FIN., AND SEC. LAW 4 (Dec. 17, 2010), (proposing that the Commission expand the anti-retaliation protections to apply to internal programs"); *Comments*, GEN. ELEC. CO., ET AL. 1 (Dec. 17, 2010) (filing by General Electric, Google, Honeywell, JPMorgan Chase, Microsoft, and Northrop Grumman asking the Commission to require whistleblower's eligible for a reward to "report any potential violation internally.").

preserve "scarce government enforcement dollars." *Id.* The Chamber also informed the Commission that their proposal "would not affect the scope of the statutory retaliation protections afforded whistleblowers under the [SEC] rule," citing directly to § 78u-6(h)(1)." *Id.* at 14.

Outside of the rulemaking proceedings, the Chamber also sponsored a so-called "Blue Ribbon" Panel that accurately recognized that the "greatest" "risk" to internal compliance was a work environment "where employees are unwilling or unable to make management aware of their knowledge of or suspicions that wrongdoing is taking place." REPORT OF ECI'S BLUE RIBBON PANEL, ETHICS & COMPLIANCE CERTIFICATION INSTITUTE 27-28 (2016). In its brief before this Court the Chamber could not explain how excluding internal reports under the DFA would promote the recommendations of its own "Blue Ribbon" panel.

The fact that the overwhelming majority of the regulated community requested incorporating internal disclosures into the core definition of a "whistleblower" is not surprising. Much of Congress' statutory framework and the SEC's regulatory scheme are predicated on internal controls and internal reporting. Incentivizing internal reporting creates the factual record that the Commission relies upon to ensure compliance with the law.[9] Securities

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[9] Digital's own Quartely Report makes note of this: "The company maintains disclosure controls and procedures that are designed to ensure that information required to be disclosed in its reports filed under the Securities Exchange Act of 1934, as

Whistleblower Incentives and Protection, 76 Fed. Reg. 34,300, 34,322-23 (June 13, 2011); 17 C.F.R. §§ 240.13a-15(e), (f); 17 C.F.R. §§ 240.15d-15(e), (f).

Mr. Steven J. Pearlman, who at the time was a partner in the firm of Seyfarth Shaw LLP and is now counsel of Record for *amicus curiae* Chamber of Commerce of the United States of America, delivered a "White Paper" before the Rand Center for Corporate Ethics and Governance which discussed these dynamics. Specifically, he explained how the provisions in the pre-DFA securities laws "require[d] employers to establish robust internal compliance mechanisms, such as anonymous reporting procedures [15 U.S.C. § 78j-1], independent audit committees [*id.*], effective internal financial controls [15 U.S.C. § 7262], and comprehensive codes of ethics and conduct [15 U.S.C. § 7264]." STEVEN J. PEARLMAN, NEW WHISTLEBLOWER POLICIES AND INCENTIVES: A PARADIGM SHIFT FROM "OVERSIGHT" TO "INSIGHT" (2011), *reprinted in* Michael D. Greenberg, *For Whom the Whistle Blows: Advancing Corporate Compliance and Integrity Efforts in the Era of Dodd-Frank*, RAND CORPORATION CONFERENCE PROCEEDINGS 33, 36 (2011), https://www.rand.org/pubs/conf_proceedings/CF290.readonline.html.

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amended, is recorded, processed, summarized and reported within the time periods specified in the U.S. Securities and Exchange Commissions rules and forms, and that such information is accumulated and communicated to its management, including its chief executive officer and chief financial officer, as appropriate, to allow timely decisions regarding required disclosure." *See, e.g.*, Digital Realty Trust, Inc., Quarterly Report (Form 10-Q) at 77 (Aug. 9, 2017).

Mr. Pearlman's expert White Paper explained that the "policy behind" this statutory "framework was to incentivize employees to report fraud internally so that companies could draw on their internal compliance machinery to promptly investigate the fraud in a manner calculated to protect investors . . ." *Id.*

In accordance with federal regulatory law, Digital implemented a work-rule requiring all employees to report any potential frauds internally to their supervisor or the legal department. CODE OF BUSINESS CONDUCT AND ETHICS, DIGITAL REALTY TRUST, INC. 6 (Feb. 17, 2016), http://s21.q4cdn.com/814695872/files/doc_downloads/highlights/2016/Code-of-Business-Conduct-and-Ethics-(Revised-Feb.-17-2016).pdf.

Based in large part on the emphatic response from industry to promote internal reporting, the Commission exercised its discretion to incorporate internal disclosures into the definition of "whistleblower" in its final rules.[10]

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[10] The NWC supported effective and independent compliance programs (and the SEC's final rule), but opposed the proposals that would make internal reporting *mandatory*. The basis for this opposition included the obstruction of justice provision that was passed by Congress as part of the Sarbanes-Oxley Act, codified at 18 U.S.C. § 1513(e). That provision makes it illegal to deny any person anything of value because that person made a truthful disclosure to a federal law enforcement agency concerning a potential crime. This provision of law establishes an overriding public policy that prevents any government agency, corporation, or individual from obstructing the right of a

B. The SEC Exercised Its Discretion Under 15 U.S.C. § 78u-6(a)(6) to Incorporate Internal Disclosures into the Core Definition of the "Manner" Employees Could Qualify as a "Whistleblower."

Congress required the SEC to determine the "manner" in which an individual could qualify as a "whistleblower" under 15 U.S.C. § 78u-6(a)(6). After the most comprehensive rulemaking proceeding ever conducted by an executive agency on any whistleblower law, the SEC incorporated internal whistleblowers into the core definition of a "whistleblower" under the DFA. In response to numerous comments received, the Commission carefully weighed the benefits of internal reporting, and established rules that encouraged such conduct, while explicitly prohibiting retaliation against those who made such reports. The reasons given by the Commission for protecting and encouraging internal reporting were to:

- "Allow companies to take appropriate actions to remedy improper conduct at an early stage";
- "Allow companies to self-report";

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whistleblower to disclose criminal violations to federal law enforcement. In the final rules, the Commission struck the appropriate balance, setting forth rules that encouraged or incentivized internal reporting, yet recoginzing the right of whistleblowers to report directly to the government, if they so choose. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34,324-27.

- "Avoid undermining internal compliance programs";
- "Allow the Commission to preserve its scarce resources by relying upon corporate compliance programs";
- "Promote a working relationship between the Commission and companies"; and
- "Increase the quality of tips."

76 Fed. Reg. at 34,324.

The specifics of the final rules make clear that internal reporting is incorporated into the core definition of "whistleblower." For example, entire classes of employees cannot become "whistleblowers" until they permit internal compliance programs a minimum of 120 days to investigate problems and self-report any verified concerns to the SEC. 17 C.F.R. § 240.21F-4(b)(iv)(4)(v)(C). If no anti-retaliation protection existed within those 120 days, internal reporting would present an enormous risk, therefore obfuscating and defeating the purpose of the provision. Additionally, under the rules, all employees are strongly encouraged to utilize compliance programs, and are provided a monetary incentive for participating in these programs. 17 C.F.R. §§ 240.21F-6(a)(2)(ii), 240.21F-6(a)(4). Conversely, employees who undermine such programs are sanctioned, and can have any award substantially reduced. *Id.* § 240.21F-6(b)(3).

The SEC, through its Congressionally-delegated authority, created a "manner" unique among whistleblower laws, such as the False Claims Act. It is the only whistleblower law for which an employee could be credited as a whistleblower by internally submitting information to their company who would then self-report to the SEC. *See* Mary L. Shapiro, SEC Chairman, Opening Statement at SEC Open Meeting: Item 2— Whistleblower Program (May 25, 2011), https://www.sec.gov/news/speech/2011/spch052511mls-item2.htm.

The Commission's anti-retaliation provisions covering internal reporting are simply ancillary to these substantive provisions, and the numerous provisions of securities law that require internal controls and corporate self-reporting. It would have been inconsistent with the legislative purposes behind the DFA, and an abuse of discretion, for the SEC to create rules mandating internal reporting for numerous employees, and providing a monetary inventive for internal reporting for all employees, without ensuring that persons who report internally are not subjected to retaliation.

Digital refers to the "express definition" of the term "whistleblower" and then claims that the SEC could not "invent a different definition." Pet'r's Br. at 12. Digital did not participate in the rulemaking proceeding which determined the definition of "whistleblower." However, the definition of "whistleblower" was not set in stone by Congress. 15 U.S.C. § 78u-6(a)(6). Congress required the Commission to "establish" the "manner" in which an

individual becomes a "whistleblower," i.e. the manner in which an individual would "provide" information to the Commission. *Id.* Digital, by failing to participate in the rulemaking, apparently also did not review the hundreds of comments submitted by the regulated community, demanding, in the strongest terms, that internal reporting be incorporated by the Commission into the core definition of how individuals would "provide" "information" to the Commission and become a "whistleblower."

Digital cannot explain how the SEC can, on the one hand, require extensive internal controls, and on the other hand, how the SEC lacks the authority to ensure that these controls are not undermined by retaliation. Likewise, Digital cannot explain why their CEO and CFO must certify, on a quarterly basis, that their internal controls are working, and that they have internally identified all frauds, yet still maintain that the SEC is somehow without authority to ensure that the employees who provide critical information as part of the internal control requirements cannot be subjected to harassment, intimidation, and retaliation simply for reporting these potential frauds. If adopted by this Court, Digital's argument would upend the process by which the SEC establishes the manner for making reports, and upend the regulatory structure that requires strong internal controls to protect investors and the American public from fraud.

II. DIGITAL'S ARGUMENT THAT THE SEC GAVE "NO HINT THAT IT WAS CONSIDERING EXPANDING THE DEFINITION OF 'WHISTLEBLOWER'" IS FALSE AND MISLEADING.

Digital argues that the SEC failed to provide "fair notice" when its final rules created an "unheralded" and "drastic" change to the definition of "whistleblower." Pet'r's Br. at 42. Digital claims the Commission gave "no hint" that it was "considering expanding the definition of 'whistleblower,'" and requested no comments on the issue. *Id.* Not only is this argument not supported on the record, it is also false and misleading.

The relationship between internal and external whistleblowing was the most contentious issue addressed in the SEC rulemaking. *See* Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70,488 (Nov. 17, 2010); 76 Fed. Reg. 34,300; Mary L. Shapiro, SEC Chairman, Opening Statement at SEC Open Meeting: Item 2—Whistleblower Program (May 25, 2011), https://www.sec.gov/news/speech/2011/spch052511mls-item2.htm ("[N]o issue received more focus during this process than the role of internal compliance programs."). Obviously, if the SEC was planning to encourage or require employees to make internal disclosures prior to being considered a "whistleblower" under the reward-related definition of that term, they would also have to ensure that

whistleblowers who made internal reports were protected from retaliation.

Shortly before the Commission published its proposed whistleblower rules, it held an open meeting during which SEC Commissioner Kathleen L. Casey explained that the Commission was seeking comments on "**what . . . the scope of the anti-retaliation provisions [should be].**" Kathleen L. Casey, SEC Commissioner, Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (Nov. 3, 2010), https://www.sec.gov/news/speech/2010/spch110310klc-whistleblowers.htm (emphasis added).

Fourteen days after the public meeting, the SEC published its rulemaking proposal, and formally asked for comments on the anti-retaliation provisions of the DFA:

> [T]he Commission is seeking comment on whether it should promulgate rules regarding the interpretation or implementation of the anti-retaliation provisions of Section 21(h) of the Exchange Act. If so, what specific rules should the Commission consider promulgating? . . . Should the application of the anti-retaliation provisions be limited or broadened in any other ways?

75 Fed. Reg. at 70,511.

As discussed above, *supra* Section I, the comments received regarding the anti-retaliation provisions strongly supported protection for internal whistleblowers. For example, the D..C. Bar Section on Corporate, Financial and Securities law urged the Commission to explicitly protect internal whistleblowers from retaliation.[11] The National Whistleblower Center ("NWC") submitted numerous separate comments supporting the protection of internal whistleblowers.[12] In addition to written comments, the NWC met individually with every

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[11] *Comments*, D.C. BAR SECTION ON CORP., FIN., AND SEC. LAW 4 (Dec. 17, 2010) (suggesting the Commission expand "the anti-retaliation protections to whistleblowers who report to persons with legal, compliance, audit, supervisory or governance responsibilities" for the company as "Section 21F(h)(1)(A)(iii) allows the Commission to so expand the anti-retaliation protections to apply to internal programs").

[12] National Whistleblower Center comments on the proposed rules are available, by date, at: https://www.sec.gov/comments/s7-33-10/s73310.shtml and https://www.sec.gov/comments/df-title-ix/whistleblower/whistleblower.shtml. *See* IMPACT OF *QUI TAM* LAWS ON INTERNAL COMPLIANCE: A REPORT TO THE SECURITIES EXCHANGE COMMISSION, NWC (Dec. 17, 2010); *Comments and Legal Guidance Concerning Proposed Rule 240.21F-8 for Implementing Whistleblower Provisions of the Dodd-Frank Act*, NWC (Jan. 25, 2011); *SEC Rule Making Proceeding – Whistleblower Regulations*, NWC (Feb. 10, 2011); *Comments and Legal Guidance Concerning Proposed Rule 240.21F-8 for Implementing Whistleblower Provisions of the Dodd-Frank Act*, NWC (Mar. 7, 2011); *Provision-by-Provision Analysis of Proposed Rule 240.21F-8 for Implementing Whistleblower Provisions of the Dodd-Frank Act*, NWC (Mar. 17, 2011); *Proposed SEC Rule 240.21F-8 and CFTC Rule RIN number 3038-AD04, for Implementing Whistleblower Provisions of the Dodd-Frank Act*, NWC (Mar. 17, 2011).

Commissioner and urged them to explicitly protect internal whistleblowers as part of their final rules.[13] No comments were submitted suggesting that the SEC did not have the authority to protect internal whistleblowers from retaliation, or suggesting that Subdivision (iii) did not protect internal disclosures as held by the Second and Ninth Circuits.

The Commission specifically requested, and received, comments regarding the scope of anti-retaliation provisions in the DFA. Digital's contention

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[13] Memos detailing these National Whistleblower Center meetings are available, by date, at: https://www.sec.gov/comments/s7-33-10/s73310.shtml and https://www.sec.gov/comments/df-title-ix/whistleblower/whistleblower.shtml. *See Memorandum from the Division of Enforcement regarding a January 25, 2011, meeting with representative of the National Whistleblowers Center*, U.S. SEC. & EXCH. COMM'N (Jan. 31, 2011); *Memorandum from the Office of Commissioner Aguilar regarding a February 10, 2011, meeting with representatives of the National Whistleblowers Center*, U.S. SEC. & EXCH. COMM'N (Feb. 10, 2011); *Memorandum from the Office of Commissioner Paredes regarding a February 11, 2011, meeting with representatives of the National Whistleblowers Center*, U.S. SEC. & EXCH. COMM'N (Feb. 11, 2011); *Memorandum from the Office of Commissioner Casey regarding a March 11, 2011, meeting with representatives of the National Whistleblower Center*, U.S. SEC. & EXCH. COMM'N (Mar. 11, 2011); *Memorandum from the Office of Commissioner Walter regarding a March 16, 2011, meeting with representatives of the National Whistleblowers Center*, U.S. SEC. & EXCH. COMM'N (Mar. 16, 2011); *Memorandum from the Division of Enforcement regarding a March 28, 2011, meeting with representatives of the National Whistleblowers Center, O'Donoghue and O'Donoghue LLP, and the National Coordinating Committee of Multi-Employer Plans*, U.S. SEC. & EXCH. COMM'N (Mar. 31, 2011).

that it was provided "no hint" of those intentions is frivolous.

III. BASIC RULES OF STATUTORY CONSTRUCTION REQUIRE THAT THIS COURT INTERPRET SUBDIVISION (III) AS PROTECTING INTERNAL DISCLOSURES AND DISCLOSURES TO FEDERAL LAW ENFORCEMENT.

Subdivision (iii) unquestionably mandates internal whistleblowers be protected under the DFA. Toward the end of the legislative process, after the House and Senate passed their own versions of the DFA's whistleblower provisions, Congress added a new substantive definition of what constituted a protected disclosure at Subdivision (iii) of 15 U.S.C. § 78u-6(h)(1)(A). *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 152-53 (2d Cir. 2015) (setting forth the legislative history of Subdivision (iii)). Prior to the addition of Subdivision (iii), activity protected under the DFA covered disclosures only "to the Commission" or for "testifying in, or assisting in" Commission proceedings. 15 U.S.C. §§ 78u-6(h)(1)(A)(i), (ii).

Under the blackletter law of statutory construction, Subdivision (iii) must be interpreted as incorporating SOX anti-retaliation provisions into the DFA's core definition of a protected disclosure and permit employees fired for making an internal disclosure of securities fraud to file a DFA retaliation case.

A. The Securities and Exchange Act Must be Interpreted as a Whole.

That a statute must be interpreted "as a whole" is well-established. *Heydenfeldt v. Daney Gold*, 93 U.S. 634, 639 (1876); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000). This settled rule of statutory construction was set out in *New Lamp Chimney v. Ansonia Brass & Copper Co.* when this Court stated that a particular provision in a statute "does not stand alone," and thus "must be read and applied in connection with" the entire regulatory scheme "so that each and every section of the act may . . . have their due and conjoint effect without repugnancy or inconsistency." 91 U.S. 656, 662 (1875); *see also Davis v. Mich. Dep't of Treas.*, 489 U.S. 803, 809 (1989).

The DFA's whistleblower protection provisions "do not stand alone" and must be read as "part of" the "general system of statutory regulation" governing publicly traded corporations. *See New Lamp Chimney Co.*, 91 U.S. at 662. The anti-retaliation provisions therefore "must be read and applied in connection with every other" securities law section relating to whistleblower protection – including Subdivision (iii)'s invocation of SOX protections. *Id.*

The Securities Exchange Act mandates internal corporate controls, and predicates most of the SEC's enforcement actions on the assumption that the numerous internal disclosures stemming from these requirements are truthful. *See* STEVEN J. PEARLMAN, NEW WHISTLEBLOWER POLICIES AND

INCENTIVES: A PARADIGM SHIFT FROM "OVERSIGHT" TO "INSIGHT" (2011), *reprinted in* Michael D. Greenberg, *For Whom the Whistle Blows: Advancing Corporate Compliance and Integrity Efforts in the Era of Dodd-Frank*, RAND CORPORATION CONFERENCE PROCEEDINGS 33, 36 (2011), https://www.rand.org/pubs/conf_proceedings/CF290.readonline.html. This includes "anonymous reporting procedures [15 U.S.C. § 78j-1], independent audit committees [*id.*], effective internal financial controls [15 U.S.C. § 7262], and comprehensive codes of ethics and conduct [15 U.S.C. § 7264]." *Id.*

In accordance with these laws, Digital is required to make numerous reports to the SEC attesting to the accuracy of its internal reporting and the integrity of its internal controls. Digital has in fact regularly filed such sworn declarations on an annual and quarterly basis. *See, e.g.*, Digital Realty Trust, Inc., Annual Report (Form 10-K) at 77 (Mar. 1, 2017).

Securities laws are predicated both on the right of employees to report fraud to the SEC, and an obligation that publicly traded companies have extensive and truthful internal reporting requirements that encourage employees to report frauds internally. Based on these internal reporting requirements the top corporate executives are required to personally sign declarations, every quarter, to the SEC, identifying any frauds identified through these internal controls.

Because the DFA retaliation provisions must be read in the context of the Securities Exchange Act as

a whole, it would be contrary to the letter of the statute, and inconsistent with its reason and spirit, to enact an anti-retaliation law that ignored those parts of federal securities laws that encouraged or required internal reporting. Subdivision (iii) was enacted to ensure that the mandatory internal control rules were harmonized with the DFA's whistleblower provisions. *See Lynch v. Overholser*, 369 U.S. 705, 711 (1962) (finding against a statutory interpretation which was "out of harmony with the awareness that Congress has otherwise shown for safeguarding" certain activities).

B. Harmonious and Consistent Reading of the DFA's Provisions Requires the Protection of Internal Whistleblowers.

Once a statute is viewed as whole, it is often possible to interpret two provisions as in conflict. This Court has previously resolved such issues by attempting to find a harmonious reading which would allow the statue, and the provisions contained within, to be read "consistent[ly] rather than conflicting[ly]" as "a symmetrical and coherent regulatory scheme." *Brown & Williamson*, 529 U.S. at 1300-01; *Helvering v. Credit All. Corp.*, 316 U.S. 107, 112 (1942).

In *F.T.C. v. Mandel Bros., Inc.*, this Court examined ambiguity between a single statute's definitional provision and another provision in the same statute. *F.T.C. v. Mandel Bros., Inc.*, 359 U.S. 385 (1959). It found that a statute's scope is not necessarily limited to the definitional provision's text if the statute contains a different provision which

expands the definitional text in a manner that more closely aligns with the purpose of the statute as a whole. *Id.* at 388-90.

The dispute between the definition of "whistleblower" in 15 U.S.C. § 78u-6(a)(6) and its definition in Subdivision (iii) is similarly resolved. Even assuming the whistleblower definition contained in the DFA is unambiguous, reading the DFA and U.S. securities laws as a whole demonstrates that excluding internal whistleblowers from protection contradicts Congress' intent to expand anti-retaliation laws for whistleblowers. The DFA was created to expand the SEC's enforcement powers and increase whistleblower protections, and did so in part by building upon SOX's existing protections.[14] The interaction between the whistleblower definition and Subdivision (iii) is synonymous with the interaction of provisions in *Mandel*, and only by harmoniously reading these provisions together to include internal whistleblowers in the DFA's protections can Congress' intended expansion be effectuated. *Id.* at 390-91.[15]

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[14] *See* S. Rep. No. 111-176 at 38 (2010) ("The SEC would have more help in identifying securities law violations through a new, robust whistleblower program designed to motivate people who know of securities law violations to tell the SEC. **It also expands existing whistleblower law**." (emphasis added)).

[15] Digital argues that somehow balkanizing the SOX and DFA anti-retaliation provisions serves the public interest. However, the entire purpo e of the DFA was to strengthen existing law, not carve out exceptions inconsistent with the overall regulatory scheme. During the Congressional hearings, it was well established that existing anti-retaliaiton laws were not sufficient and as demonstrated in the Boehme White Paper

Additionally, this Court has reasoned that when two allegedly incompatible provisions could be given full effect without creating an absurd, conflicting, or impractical result, such an interpretation should apply. *Helvering*, 316 U.S. at 112. In *Helvering*, the Court rejected a proposed statutory reading which would have allowed one provision to completely overshadow the plain language of another. *Id.*; *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 108 (2010) (holding that when the text permits, statutory provisions should be construed as consistent, because subverting one provision to another undermines both the provision's purpose and the underlying legislative purpose).

Analogously, Petitioner's proposed reading of the DFA's whistleblower definition would overpower Subdivision (iii) in contravention of the *Helvering* rationale and the DFA's objective of expanding whistleblower protections. Just as in *Helvering*, this Court should reject the interpretation which would allow one provision to override the plain language and meaning of another when each can be given effect without repugnancy. *Helvering*, 316 U.S. at 112; *Kawasaki*, 561 U.S. at 108.

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to RAND, compliance programs needed further bolstering than had been afforded under SOX. *See* Boehme, RAND CENTER FOR CORPORATE ETHICS AND GOVERNANCE (March 5, 2009), https://www.rand.org/pubs/conf_proceedings/CF258.readonline.html.

C. The Specificity of Subdivision (iii) and the Timing of Its Addition to the DFA Mandates that Internal Whistleblowers be Protected.

If the Court finds the two relevant provisions to be in conflict, it should look to longstanding principles of statutory interpretation and find the DFA provides protection for internal whistleblowers because Subdivision (iii) is both the more specific provision and was the last manifestation of legislative intent.

This Court has affirmed that matters specifically provided for in one provision of a statute shall not be subverted to another provision of the same statute which contains related, but more generally-applicable language. *Bloate v. United States*, 559 U.S. 196, 207-208 (2010); *see Edmond v. United States*, 520 U.S. 651, 657-58 (1997) ("where a specific provision conflicts with a general one, the specific governs"). This principle is especially true where a certain reading of the general provision would violate the "cardinal principle of statutory construction" and render another provision "superfluous, void, or insignificant." *TRW Inc. v. Andrew*, 534 U.S. 19, 31 (2001) (internal quotations omitted); *Duncan v. Walker*, 553 U.S. 167, 174 (2001).

In *Bloate*, this Court recognized that although one provision of the Speedy Trial Act of 1974 was broad enough to encompass time granted to prepare pretrial motions before a criminal trial, it should not preclude application of another provision which more specifically addressed the defendant's leave for pre-

trial preparations. *Bloate*, 559 U.S. at 207-09. This Court recognized that reading the general provision as modifying the specific provision would render the specific provision "virtually superfluous," despite its unambiguous language. *Id.* at 208-09.

Like the interaction between the statutory provisions in *Bloate*, the DFA's whistleblower definition's general language should not be interpreted as a scope-limiting provision that would "modify the contents" of the specific text in Subdivision (iii). *Bloate*, 559 U.S. at 209. Contrary to a general, non-exhaustive definition, Subdivision (iii) was specifically crafted as a mechanism for extending the DFA's anti-retaliation protections to internal whistleblowers from the statutory foundation of SOX. The proposed interpretation provided by Petitioners would render Subdivision (iii) superfluous in violation of the cardinal principle of statutory construction repeatedly espoused by this Court. *TRW Inc.*, 534 U.S. at 31; *Duncan*, 553 U.S. at 174. Therefore, the Court should acknowledge that a "specific provision . . . controls [provisions] of more general application," and give full effect to Subdivision (iii). *Bloate*, 559 U.S. at 207.

Finally, as Subdivision (iii) was added in the final drafting process of the DFA – after the whistleblower definition provision – it trumps any inconsistency with previously inserted provisions. *Russello v. United States*, 464 U.S. 16, 23-24 (1983). As in *Russello*, where this Court determined that removing a limiting provision contained in an earlier draft of a bill should lead to the presumption that

such limitation was not intended by Congress, the late addition of the protection for internal whistleblowing found in Subdivision (iii) unmistakably shows Congress' intent that such whistleblowers are protected, and that the definition of "whistleblower" is not constrained by an earlier inserted provision. *Id.*

IV. DIGITAL'S ARGUMENT WOULD UNDERMINE THE CENTRAL LAW ENFORCEMENT COMPONENTS OF THE REGULATORY SCHEME FAR BEYOND INTERNAL REPORTING.

Subdivision (iii) of 15 U.S.C. § 78u-6(h)(1)(A) protects not just the internal reporting, but also covers disclosures to the Department of Justice ("DOJ") and Congress. It is inconceivable that Congress would draft a major Wall Street reform law and exclude reports to law enforcement and Congress from its protections.

The Sarbanes-Oxley Act ("SOX") – relied on in Subdivision (iii) – includes provisions that protect whistleblowers at publicly traded companies from retaliation where that whistleblower reported to "(A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (C) a person with supervisory authority over the employee." 18 U.S.C. § 1514A(a)(1). Digital has focused on the third category of disclosures protected under Subdivision (iii), but for are obvious reasons, failed to explain to this Court that upholding Digital's interpretation of the law would also result in

stripping protections for disclosures to Congress and the DOJ.

To suggest that Congress would preclude the DOJ and Congress from the definition of protected disclosures in the DFA is preposterous. Congress held extensive hearings pertaining to the events that led to enactment of the DFA. It is only logical that Congress would want a law that protects its own witnesses from retaliation. The same is true of the DOJ, which has jurisdiction to investigate and prosecute securities fraud.

Further, the DFA defines "related action" to include "any judicial or administrative action brought by" entities such as the Attorney General. 15 U.S.C. §§ 78u-6(a)(5), (h)(2)(D)(i)(I)-(IV). Based on this definition of a "related action" – as someone who brings information to another agency or government body – the DFA cannot be read as requiring whistleblowers to bring information to **only** the SEC in order to be protected from retaliation. Accordingly, the SEC's adoption of a whistleblower definition tied to Subdivision (iii) is utterly logical.

V. FOR NEARLY 50 YEARS, CONGRESS, COURTS AND ADMINISTRATIVE AGENCIES HAVE HELD THAT INTERNAL EMPLOYEE DISCLOSURES ARE PROTECTED UNDER ANTI-RETALIATION LAWS SIMILAR TO THE DFA.

Although the specific legislative history behind Subdivision (iii) is scant, background for which Congress has legislated on similar whistleblower laws for the past 50 years is robust and clear. Since 1969, Congress has enacted numerous anti-retaliation/whistleblower protection laws, usually as part of a larger reform law. These laws sometimes explicitly protect employees who report internally to their managers, while other laws are similar in nature to 15 U.S.C. § 78u-6(h), and only directly mention reports to government officials or regulators with responsibility over the reform law in question.

However, in numerous cases in which Congressional intent to protect internal disclosures was called into question, Congress clarified its intent to ensure internal disclosures were protected. Likewise, the administrative agencies with mandates to enforce these laws have uniformly interpreted them as protecting internal disclosures. These precedents help clarify Congress' actions in crafting the DFA.

The issue currently before this Court first arose in the context of mine safety. In 1969, Congress enacted the Federal Mine Health and Safety Act

("MHSA"), which, like the DFA, created a broad federal regulatory scheme policing an industry. One part of that law protected whistleblowers, using language similar to DFA Sections 78u-6(h)(i) and (ii).[16] The first court to review a case under MHSA was asked to determine whether an internal report to a supervisor was, as a matter of law, protected activity – even if no report was made to the Mine Health and Safety Commission. Writing for a 2-1 majority of the U.S. Court of Appeals for the D.C. Circuit, Judge Malcom Wilkey firmly established that internal reports – like those articulated in Section 78u-6(h)(1)(A)(iii) – were simply the "first step" in a report to the government, and were thus as equally protected as a direct report to the government. *Phillips v. Interior Bd. of Mine Operations Appeals,* 500 F.2d 772, 781 (D.C. Cir. 1974).

Judge Wilkey's reasoning, which was explicitly ratified by Congress in 1977, is equally applicable to the DFA. First, Judge Wilkey understood that miners were in "the best position to observe the compliance or noncompliance with safety laws" and that "sporadic

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[16] In relevant part, the 1969 MHSA stated: "No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act." 91 P.L. 173, 83 Stat. 742 §§ 110(b)(1), (2).

federal inspections can never be frequent or thorough enough to insure compliance." *Id.* at 778.

Second, Judge Wilkey understood that "miners who insist on health and safety rules being followed, even at the cost of slowing down production, are not likely to be popular with mine foreman or mine top management." *Id.* Thus, "only if miners are given a realistically effective channel of communication re health and safety, and protection from reprisal after making complaints, can [MHSA] be effectively enforced." *Id.*

Finally, the employee's "notification to the foreman of possible dangers is an essential preliminary stage in both the notification to the Secretary (A) and the institution of proceedings (B), and consequently brings the protection of [MHSA] into play." *Id.* at 779.

Because of the controversy surrounding the protection of internal disclosures highlighted in *Phillips* (which had a strong dissent), Congress explicitly ratified the holding in *Phillips* and other cases that protected internal disclosures. *See* S. Rep. No. 95-181 (1977) , 3436 ("The committee intends to insure the continuing vitality of various judicial interpretations of section 110 of [MHSA] which are consistent with the broad protections in the bill's provisions; See, e.g., *Phillips v. IBMA*, 500 F.2d 772.").

Thereafter, other courts relied upon this Congressional ratification of MHSA's whistleblower

provision to endorse similar interpretations of other laws to protect internal disclosures, including the Energy Reorganization Act. *See Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985) ("*Phillips* . . . unequivocally stand[s] for the proposition that internal activities are to be protected under the original version of [MHSA]. Thus, it is clear that Congress was advocating the protection of internal action.").

The court in *Phillips* also considered the company's internal operating procedures for further support that internal disclosures needed broad protection, looking to the "procedure implementing the statute" that was "actually in effect" at the mine in which the employee worked. *Phillips*, 500 F.2d at 779. Those procedures mandated that miners report safety concerns to their supervisors as a first step in the investigatory process. As noted by Judge Wilkey, "the existence of this procedure in itself was a practical recognition that the bare words of [MHSA], unless implemented by some procedure at the mine to bridge the gap between 'the Secretary or his representative' ... and the coal miner himself ..., would be completely ineffective in achieving mine safety." *Id.* at 779, 781.

Similar procedures existed within Digital Realty. These procedures, codified in Digital's Code of Business Conduct and Ethics, were distributed to every employee, and published online in the web page dedicated for investor information:

"All employees have a duty to report any known or suspected violation of this Code and any violation of laws, rules, regulations or policies that apply to the Company.

* * *

If you know of or suspect a violation of this Code, immediately report the conduct to your supervisor. Your supervisor will contact the General Counsel, who will work with you and your supervisor to investigate your concern. . . You may also report [to the company by mail]. . . You may also . . . report by telephone via the Company's confidential hotline.

* * *

Your supervisor, the General Counsel and the Company will protect your confidentiality to the extent possible, consistent with law and the Company's need to investigate your concern. The Company strictly prohibits retaliation against an employee who, in good faith, seeks help or reports known or suspected violations."

CODE OF BUSINESS CONDUCT AND ETHICS, DIGITAL REALTY TRUST, INC. 6 (Feb. 17, 2016),

http://s21.q4cdn.com/814695872/files/doc_downloads/highlights/2016/Code-of-Business-Conduct-and-Ethics-(Revised-Feb.-17-2016).pdf.

After Congress ratified Judge Wilkey's decision in *Phillips*, every court and administrative agency aware of this ratification applied the *Phillips* holding to a wide range of whistleblower laws that, like the 1969 MHSA, failed to explicitly include internal disclosures as a first step in making a report to the government. *See, e.g.*, *Kansas Gas*, 780 F.2d at 1512-13 (citing to ratification to hold that internal reporting is protected under the Energy Reorganization Act); *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 932 (11th Cir. 1995) (citing to *Phillips* and Congressional ratification of that holding); *Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor*, 992 F.2d 474, 479 (3d Cir. 1993) (internal reporting protected, citing to *Phillips); Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1162-63 (9th Cir. 1984) (citing to *Phillips*); *Willy v. Admin. Review Bd.*, 423 F.3d 483, 489 n.11 (5th Cir. 2005) (internal whistleblowing protected under Clean Air Act based on Congressional ratification theory).

More recently, under the Whistleblower Protection Enhancement Act of 2012 ("WEPA"), Congress explicitly "clarified" the meaning of whistleblower disclosures under the Whistleblower Protection Act of 1989. In the Senate Report discussing the WEPA, Congress explained that it was rejecting the "narrow definition" of a protected disclosure, and was "clarify[ing]" its original intent to protect internal disclosures. The section of the report

which clarified Congress' original intent to protect internal disclosures was entitled "Clarification of what constitutes a protected disclosure." S. Rep. No. 112-155 at 4 (2012) (emphasis in original). Thereafter, the Merit System Protection Board, the agency with responsibility for interpreting the WEPA, found that the explicit incorporation of internal disclosures into the definition of a protected disclosure was a clarifying amendment. *Day v. Dep't of Homeland Sec.*, 2013 MSPB 49 (June 26, 2013).

The U.S. Secretary of Labor, who has jurisdiction to administer numerous whistleblower laws that do not explicitly cover internal reports, has carefully reviewed the issue of internal versus external reporting for nearly 40 years. Under every administration, beginning with President Ronald Regan, the Secretary has consistently held that internal reports are fully protected under statutes comparable to Section 78u-6(h). *See, e.g., Wells v. Kansas Gas & Elec. Co.*, No. 83-ERA-12 (June 14, 1984) (D&O of Sec'y Donovan) (internal protected under Energy Reorganization Act); *Poulos v. Ambassador Fuel Oil Co., Inc.*, No. 86-CAA-1 (Apr. 27, 1987) (D&O of Sec'y Brock) (internal protected under Clean Air Act); *Flor v. U.S. Dept. of Energy,* No. 93-TSC-1 (Dec. 9, 1994) (D&O of Sec'y Reich) (internal protected under Toxic Substances Control Act); *Nathaniel v. Westinghouse,* No. 91-SWD-2 (Feb. 1, 1995) (D&O of Sec'y Reich) (internal protected under the Solid Waste Disposal Act and the Comprehensive Environmental Response, Compensation, and Liability Act). In *Willy v. Coastal Corp.*, Secretary of Labor Brock justified his holding that internal reports

were protected under the Clean Air Act whistleblower provision by explaining that Congress "expressly" "clarify[ied] its "approval" of *Phillips*. *Willy v. Coastal Corp.*, No. 85-CAA-1 (June 1, 1994) (D&O of SOL).

As explained in *Phillips*, the failure to protect the first steps in reporting a violation – i.e. internal complaints – "would nullify not only the protection against discharge, but also the fundamental purpose of the Act," reducing it to "a hollow promise of protection." *Phillips*, 500 F.2d at 781.

VI. DIGITAL'S POSTION WILL UNDERMINE THE SUCESSFUL SEC WHISTLEBLOWER PROGRAM.

The DFA whistleblower program has had a "transformative impact" on the Commission's enforcement program,[17] "both in terms of the detection of illegal conduct and moving . . . investigations forward quicker and through the use of fewer resources." *The SEC's Whistleblower Program: The Successful Early Years*, SIXTEENTH ANNUAL TAXPAYERS AGAINST FRAUD CONFERENCE (Sept. 14, 2016), https://www.sec.gov/news/speech/ceresney-sec-

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[17] 2016 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, U.S. SEC. & EXCH. COMM'N at 1 (Nov. 15, 2016), https://www.sec.gov/files/owb-annual-report-2016.pdf ("The transformative effect of the SEC's whistleblower program has had on the agency's enforcement program is further demonstrated by the hundreds of millions of dollars that have been returned to investors. . . [I]t has also bolstered the agency's enforcement efforts and aided harmed investors.").

whistleblower-program.html (comments of SEC Division of Enforcement Director Andrew Ceresney).

As observed by Commission Chair Mary Jo White, because of the success of the SEC whistleblower program, "[g]one are the days when corporate wrongdoing can be pushed into the dark corners of an organization." Mary Jo White, SEC Chair, The SEC as the Whistleblower's Advocate, SEC. LAW INST., NORTHWESTERN UNIV. SCH. OF LAW (Apr. 30, 2015), https://www.sec.gov/news/speech/chair-white-remarks-at-garrett-institute.html. Employees can now "view internal reporting as an effective means to address potential wrongdoing without fear of reprisal or retaliation." *Id.* The SEC's effective implementation of the DFA was a "game changer." *Id.*

This Court should not undo the careful balance struck by the SEC, which harmonized the internal control requirements set forth in federal securities law, with the whistleblower award and retaliation provisions in the DFA. The law is working; investors are protected; companies are investing in their compliance programs. Whistleblowers need to be encouraged, whether they report violations directly to the SEC, or work through the internal control procedures established under U.S. securities law.

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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